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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1232

LARRY A. CARR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioner, Larry A. Carr, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on 12 May 1977 and the denial of a rehearing en banc rendered on 3 February 1978.

OPINION BELOW

The Court of Appeals entered its Memorandum confirming the conviction of petitioner on 12 May 1977. A copy of that Memorandum, which is not to be reported officially, is attached as Appendix "A".

JURISDICTION

On 12 May 1976 the Court of Appeals entered judgment confirming the convictions of petitioner for conspiring to sell unregistered securities in violation of Title 18, U.S.C. §371, Title 15, U.S.C. §77(e)(a), 77(q)(a) and 77(x) and the fraudulent sale of securities in violation of Title 15, U.S.C. §77(q)(a) and 77(x). The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals misapply the holding in *United States v. Miller,* 425 U.S. 435 (1975) in determining that a handwritten memorandum of petitioner Carr constituted a "corporate record" in which the petitioner has no proprietary interest?

2. Is severance required where the exculpatory testimony of a codefendant is an essential element of the defense?

STATEMENT OF ESSENTIAL FACTS

The applicable facts surrounding each of the above issues are set forth below:

A. PROPRIETARY INTEREST-GRAND JURY SUBPOENAS

In preparation of its case, the Government utilized grand jury subpoenas for the seizure of a number of documents. These subpoenas were issued by the prosecutor's office without the knowledge or consent of the grand jury (R.T. 70).[1/] In July of 1974, Customs Agent James Ingraham obtained a grand jury subpoena and took the subpoena to the Patterson corporate offices in Atlanta, Georgia. Upon his arrival in Atlanta, he utilized the subpoena in lieu of a search warrant to obtain access to the records of petitioner Carr. It was during this time that Agent Ingraham obtained a document entitled "Patterson Priorities" (R.T. 2938-2940).

The two-page document entitled "Patterson Priorities" (Exhibit 59) was a handwritten memorandum prepared by petitioner. It outlined petitioner's ideas and suggestions with respect to items he and Patterson Corporation needed to accomplish. The document bore the phrase "Get stock purchases going throughout the United States." At trial, the Government argued that this document clearly indicated petitioner's knowledge of the manipulation and his intent to participate in the conspiracy to sell unregistered stock. (R.T. 5948-5949).

1/ "R.T." refers to Reporter's Transcript.

The document was not prepared on company letterhead and did not bear petitioner's signature as an officer of the corporation. At the time of the seizure, petitioner had resigned as an officer of the corporation, but he continued to hold 128,000 restricted shares. No evidence was presented to show that petitioner ever abandoned ownership of this document. When seized, the documents were being stored on the corporate premises in Atlanta, Georgia. Petitioner could reasonably expect that the storage of his documents such as this handwritten memorandum would not be disturbed or released without his prior consent and approval.

The Ninth Circuit Court of Appeals classified the memorandum as a corporate document and held that petitioner had no proprietary interest in the document. As a result of this ruling, petitioner was foreclosed from contesting the unauthorized use of the grand jury subpoena in lieu of a search warrant.

B. SEVERANCE

During the trial, Michael Gardner, a co-conspirator and a government witness, testified that he was contacted by co-conspirator Joseph Merola on behalf of petitioner. Gardner stated that Merola told him that petitioner wanted to collect all of the outstanding Patterson stock to revive the stock manipulation. Merola, according to Gardner, requested that Gardner attempt to obtain the outstanding stock for petitioner (R.T. 1773-1777). Midway through the trial, petitioner Carr

learned that Merola had made a statement to Customs Agent James Ingraham on December 2, 1974 wherein he advised Agent Ingraham that someone other than Carr had told him to obtain the stock from Gardner. This statement is in direct opposition to the testimony of Gardner. Prior to this time, motions had been made to sever petitioner's case from the case of codefendant Merola (R.T. 284-286). Upon learning of the statement made to Ingraham, the issue of severance was again raised (R.T. 2928).

Petitioner was unable to utilize the statement made to Agent Ingraham since the trial court ruled that the statement had not been made voluntarily. Thus, the government was prohibited from introducing the statement at the time of trial. Further, because of the joint trial, petitioner was unable to call either Merola or Agent Ingraham to testify with respect to the statement. At the conclusion of the jury trial, petitioner was convicted on one count of conspiring to sell unregistered securities by the use of fraudulent, manipulative and deceptive practices. Further, he was convicted on one count of selling unregistered securities through the use of fraudulent statements.

Petitioner's contact with Patterson Corporation, the issuer of the securities in question, and his involvement with the individuals later determined to be conspirators took place at the end of the alleged period of the conspiracy. The testimony of Merola was essential to petitoner's defense to show that he was not a part of the conspiracy at that time and that he did

not make any statements with respect to reviving or continuing with the alleged stock manipulation. Without Merola's statement, the jury was left only with the statement from Gardner that indicated petitioner had knowledge of the conspiracy and was participating in it.

REASONS FOR GRANTING WRIT

The reasons urged for granting a writ of certiorari are as follows:

1. *The opinion in United States v. Miller, 425 U.S. 435 (1975) does not foreclose the petitioner from establishing standing to object to the seizure of his handwritten memorandum.*

In *United States v. Miller, supra,* this Court held that bank records consisting of checks and deposit slips did not constitute a person's private papers and therefore seizure of said records did not violate the Fourth Amendment. The opinion notes that the checks and deposit slips ". . . are the business records of the banks" (at page 440). Thus, this Court concludes that "We think that the Court of Appeals erred in finding the subpoenaed documents to fall within a protected zone of privacy." (At page 440)

In the instant case, *United States v. Miller, surpa* was relied upon by the Ninth Circuit Court of Appeals in concluding that petitioner had no proprietary interest in the "Patterson Priorities Memorandum" and therefore, no standing to object

to the seizure. Petitioner was thus estopped from having his argument considered, upon uncontradicted evidence, that the subpoena had been issued without the knowledge of the grand jury and used in lieu of a search warrant.

The Fourth Amendment's protection extends to the compulsory production of a man's private papers. *Boyd v. United States,* 116 U.S. 616, 622 (1886). The classification of documents as "corporate records" as opposed to "private papers" was before this Court in the context of the Fifth Amendment in *Wilson v. United States,* 221 U.S. 361 (1911) where the Court stated at page 380,

> * * * "The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the *Boyd Case* where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. If he has embezzled the public moneys and falsified the public accounts he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional

> privilege against selfcrimination. The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." * * * (Emphasis in original quote)

The document in question is a handwritten memorandum prepared by petitioner outlining the steps and activities to be undertaken by himself and the company. It is not a public record or an official document. Nor was he required to prepare such a document in his role as a corporate officer. The memorandum does not appear on corporate letterhead and is not a record prepared in the normal course of business. This document does not fall within the classification of "corporate documents" found in *United States v. Miller, supra* and *Wilson v. United States, supra.*

The Court's attention is also directed to the case of *Andresen v. Maryland*, 427 U.S. 463 (1976) wherein petitioner, a lawyer, was entitled to contest the seizure of corporate files containing the handwritten notes of a corporate employee and other items taken from the offices of the corporation. The opinion notes that these were not "corporate records" despite the fact that they were found in the corporate offices and consisted of handwritten notes of a corporate employee.

Petitioner submits that the petition for writ of certiorari should be granted so that this Court can establish proper

guidelines for determining and distinguishing between "personal papers" and "corporate documents." The available criteria for distinguishing between these categories is vague and no proper criteria exists for making this determination. See concurring opinion of Justice Brennan, *Fisher v. United States,* 425 U.S. 391 (1975) at 416-428; See also Comment, *Search and Seizure of Private Papers*: Fourth and Fifth Amendment Considerations, 6 Loyola (L.A.) Law Review 274, 300-303.

2. *A motion for severance is required where a defendant is unable to introduce exculpatory evidence on an essential issue in a joint trial.*

The opinion of the Ninth Circuit notes on page 4 that "although Carr's motion apparently has some merit, it cannot be said that the trial judge abused his discretion in refusing to grant a severance."

The Fourth and Seventh Circuits have taken the position that severance may become obligatory where one defendant's case rests on the exculpatory testimony of a codefendant. *United States v. Shuford,* 454 F.2d 772 (4th Cir. 1971); *United States v. Echeles,* 352 F.2d 892 (7th Cir. 1965).

In *United States v. Harris,* 542 F.2d 1283, 1313 (7th Cir. 1976) the Seventh Circuit adopted the criteria set forth by the Fifth Circuit in *United States v. Martinez,* 486 F.2d 15 (5th Cir. 1973) for determining when severance is required in this situation. The criteria consisted of the following questions:

a. Has the movant shown to the Court's satisfaction that the testimony would be exculpatory, in effect?

b. Has the movant shown to the Court's satisfaction that the co-defendant would in fact testify at a separate trial?

c. What is the significance of the desired testimony to the movant's defense?

The facts in the instant case establish that the petitioner can meet each of the criteria set forth above. The testimony would be exculpatory since it would show that petitioner did not participate in a conversation wherein he suggested reviving the conspiracy. Second, the codefendant has indicated he would testify.

Third, the statement is significant with respect to the selling count as well as the conspiracy count. It was utilized by the Government to show knowledge of the fraudulent stock scheme in each instance. Petitioner never approached any member of the public with respect to the sale of this stock. His only connection was in the preparation of certain documents which were utilized in the sale. His defense was that he had no knowledge that these documents would be so utilized. It was essential to his defense to establish that he had no knowledge of the fraudulent sale of stock and therefore, it was essential for him to show that he did not initiate or participate in the conversation concerning the "revival of the stock manipulation." A jury which found that petitioner had participated in this conversation could readily infer that he

had knowledge that the documents he prepared would be utilized in the fraudulent sale of stock. The denial of the severance motion prevented petitioner from utilizing the Merola statement to show he was not a participant in this conversation.

This court is urged to consider the issue when severance is required where a codefendant is in the position to provide exculpatory evidence on a critical issue but is prohibited from doing so because of a joint trial. Several circuits have attempted to establish criteria for the granting of severance in this situation. Petitioner has complied with the guidelines established in the Fifth and Seventh Circuits. It is requested that this Court establish criteria which can be applied uniformly in all circuits.

CONCLUSION

For the foregoing reasons, petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

AMOS & CURNOW

By _____
E. MAC AMOS, JR.

Attorneys for Petitioner

APPENDIX

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. RICHARD B. ANDERSON, CLEO H. BULLARD, and LARRY A. CARR, *Appellants.*	Nos. 76-1213, 76-1251, 76-1348 MEMORANDUM

[May 12, 1977]

Appeal from the United States District Court for the Southern District of California

Before: ELY and WALLACE, Circuit Judges, and SPENCER WILLIAMS,* District Judge.

After a prolonged jury trial, Larry Carr was convicted of conspiracy and selling unregistered securities by the use of fraudulent, manipulative, and deceptive practices. Codefendants Bullard and Anderson were convicted on six counts of the same and codefendants Merola and Linza were acquitted on all counts. Carr and Bullard received concurrent 18-month terms and Anderson received concurrent 3-year and 2-year terms. All three join in this appeal. For reasons discussed below, all convictions are affirmed.

FACTS

In late 1972, codefendant Smith, who died prior to trial, devised a scheme whereby he would obtain a shell corporation, inflate the value of the stock by overrating its assets and manipulating the supply of its stock, and then "blow it off" to

*Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

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the public. Bullard owned substantially all the shares of such a corporation (Patterson Corp.) and willingly made it available for Smith's scheme. He and Anderson reassembled most of the outstanding shares by merely dropping the shareholder's names from the corporate records and reissuing the stock in the names of Bullard and Smith's nominees.

Thereafter, and in order to inflate the value of Patterson's assets, Smith and Anderson exchanged stock in Patterson for 700,000 pounds of helicopter parts variously appraised at between $20,000 and $6 million. They then prepared a financial statement representing the value of the helicopter parts to be $22 million and commenced manipulation of the price of the stock. This was accomplished by controlled sales by and between various stock brokers whose cooperation was assured through payoffs and kickbacks. The plan was to create the appearance of a steadily advancing market and the goal was to increase the market price from twenty-five cents ($.25) to $10.00 per share. By September of 1973 the price had been pumped up to $2.75. At about this time Smith and Anderson acquired Carr's failing corporation through an exchange of stock and installed Carr as First Vice-President of Patterson. Carr's first assignment was to prepare a brochure about the Patterson Corporation. Called the "Patterson Update" it painted a false and misleading picture as to the status of the corporation and specifically as to the value of Patterson's assets. The 'update' was used in connection with the sale of Patterson stock.

The scheme fell through in October 1973 when Anderson admitted part of the fraud at a SEC hearing. The following month Carr replaced Anderson as president of Patterson and the SEC suspended trading in Patterson stock. Shortly thereafter, according to testimony of unindicted coconspirator Gardner, Merola came to him at the behest of Carr and sought his assistance in reviving the scheme. He was unable to do so and the manipulation collapsed. Appellants raise eleven issues on appeal.

SINGLE CONSPIRACY INVOLVING CARR

Appellant Carr argues that the Government actually alleged two conspiracies, one prior to this joining the scheme and a later revival in which he was involved. The rule in the Ninth Circuit is that "once a conspiracy is shown, slight evidence is all that is required to connect the defendant with the conspiracy [citation omitted]." *Diaz-Rosendo v. United States,* 357 F.2d 124, 130 (9th Cir. 1966) *cert. denied* 385 U.S. 856. Inasmuch as all of the activity was directed toward the same end, i.e., to manipulate the value of Patterson stock, the Government has demonstrated that only one continuing conspiracy existed. *Blumenthal v. United States,* 332 U.S. 539 (1947).

The evidence should be taken in its most favorable light to sustain the lower court's conviction of appellant. *Diaz-Rosendo, supra.* And the record is sufficient to demonstrate that Carr knew of the false and misleading nature of the Patterson Update when he released it to the public. This involvement in an integral part of the fraudulent scheme is sufficient to link Carr to the conspiracy.

ANDERSON'S SEC TESTIMONY

Appellant Anderson contests the admission of his statements made before the SEC since the hearing officer knew of the concurrent criminal proceeding against the Patterson Corporation. Therefore, according to Anderson, he should have been given the full panoply of *Miranda* warnings. The only *Miranda* warning not given was that if he could not afford one, an attorney would be appointed for him. He repeatedly waived his right to counsel. There was no evidence of involuntariness or coercion at the SEC hearing. The Ninth Circuit and the Supreme Court have ruled that *Miranda* warnings need not be given in these circumstances. *United States v. Robson,* 477 F.2d 13 (9th Cir. 1973); *Beckwith v. United States,* 425 U.S. 341 (1976).

GRAND JURY SUBPOENA

Appellants object to the prosecutor's issuance of a grand jury subpoena without the grand jury's knowledge or consent. We need not reach the issue since none of the appellants have satisfied the standing requirement necessary to challenge a search and seizure on Fourth Amendment grounds. *Brown v. United States,* 411 U.S. 223 (1972). All of the appellants had resigned

their position with Patterson prior to the seizure and none were on the premises when the "Patterson Update" was seized. Carr alleges a proprietary interest in the document, since it was in his own handwriting. However, the content of the memo makes it clear that he was outlining a corporate, rather than a personal, plan of action. Therefore, he does not have the proper proprietary interest. *United States v. Miller,* 425 U.S. 435 (1976).

CARR'S MOTION FOR SEVERANCE

During its investigation of the case, the Government learned from Merola that his statement implicating Carr in the revival of the scheme was not true. The court found that this statement was involuntarily taken and would not permit Carr to introduce it at trial. Merola stated that he would be willing to testify at a separate trial and Carr asked for a severance.

Absent an abuse of discretion, the ruling of the trial judge not to grant a severance will rarely be disturbed on review. *United States v. Campanale,* 518 F.2d 352 (9th Cir.) *cert. denied* 423 U.S. 1059, *reh. denied* 424 U.S. 950 (1975). Although Carr's motion apparently has some merit, it cannot be said that the trial judge abused his discretion in refusing to grant a severance. Even if the jury would give credence to Merola's later statement, there was a plethora of other evidence related to Carr's role in the conspiracy and it seems unlikely that he would have been acquitted at a separate trial. Even if he were acquitted of the conspiracy charge he would be unable, in view of his conviction on the selling count, to demonstrate any prejudice under the concurrent sentence rule.

SUPPLEMENTAL JURY INSTRUCTIONS

After three months of trial and four-and-a-half days of deliberations, the jury reported that it had reached a verdict in regard to four of the defendants and was deadlocked as to the fifth. The trial judge told them:

> Ladies and Gentlemen of the jury, at this time you will be allowed to go home and tomorrow morning at 9:00 o'clock I would request that you continue your deliberations following the same pattern that you have previously. I'm not going to make any comments beyond what I have just said.

The next morning the jury deliberated for two-and-a-half hours before returning the final verdict.

In order to find a supplemental jury instruction improper, it must be shown that it was unduly coercive. *Sullivan v. United States,* 414 F.2d 714 (9th Cir. 1969). The judge had earlier told the jurors to maintain their honest conviction as to the weight of the evidence. Therefore when he later told them to continue in the same pattern, that did not have the effect of coercing the jury into reaching a verdict.

Appellants raise five further issues, none of which have any merit. For the reasons stated above, all convictions are affirmed.